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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: SEATTLE
MSC 06 076 10433

Date: **MAR 10 2010**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Inadmissibility pursuant to Section 212(a)(6)(C)(i) of
the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182.

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Director, Seattle, Washington, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant was inadmissible under both section 212(a)(9)(B)(i) and section 212(a)(9)(C)(i) of the Immigration and Nationality Act (Act). The director concluded that the applicant had failed to establish his eligibility for a waiver of these grounds of inadmissibility due to humanitarian reasons, family unity, or public interest considerations. Therefore, the director denied the Form I-690, Application for Waiver of Grounds of Excludability (now referred to as Inadmissibility).

On appeal, counsel contends that director erred by not issuing a notice of intent to deny prior to denying the Form I-690 waiver application. Counsel asserts that the applicant is not inadmissible under either of the grounds cited by the director in the denial. Counsel argues that the director failed to consider either the applicant's presence in the United States for over twenty years or the severe hardship he would be forced to endure if he returned to his home country. Counsel requests a copy of the record of proceedings and states that a brief will be forthcoming within thirty days of compliance with this request.

The record shows that subsequent to the appeal, counsel submitted a Freedom of Information Act request for a copy of the record. The record further shows that USCIS complied with counsel's request with Control Number [REDACTED] and mailed a copy of the record to counsel on November 18, 2008. Counsel subsequently submitted a brief that will be incorporated into the applicant's appeal.

The statute at section 212(a)(9)(B)(i) of the Act states in pertinent part:

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The statute at section 212(a)(9)(C)(i) of the Act states in pertinent part:

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

Although the director made a general determination that the applicant was inadmissible under both section 212(a)(9)(B)(i) and section 212(a)(9)(C)(i) of the Act, there was no specific finding as to which particular subsections applied to the applicant in the instant case. Therefore, the issue to be examined in this proceeding is which particular grounds of inadmissibility if any are applicable to the applicant in light of the evidence contained in the record.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

A review of the record reveals that that the applicant previously submitted a Form I-589, Application for Asylum and for Withholding of Deportation, to the Service on May 20, 1996. The applicant’s Form I-589 application was subsequently denied by the Director, San Francisco, California on July 16, 1996 and the applicant was placed into removal proceedings before the Immigration Judge. The record shows that the applicant appeared before the Immigration Judge on December 3, 1997 and withdrew his Form I-589 asylum application. The Immigration Judge granted the applicant voluntary departure until March 3, 1998 with an alternate order of deportation thereafter. The record contains no evidence to demonstrate that the applicant complied with the Immigration Judge’s grant of voluntary departure from the United States by March 3, 1998.

The applicant subsequently submitted a Form I-687, Application for Status as a Temporary Resident, and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, on December 15, 2005. At parts #16, 17, and 18 of the Form I-687 application, the applicant claimed that he last entered the United States without being inspected by crossing the Mexican border without a visa on August 8, 1998. The applicant also submitted a Form I-690 waiver application on December 15, 2005.

The applicant cannot be considered to be inadmissible under section 212(a)(9)(B)(i)(I) of the Act because the applicant did not voluntarily depart the United States prior to the commencement of removal proceedings before the Immigration Judge.

The applicant cannot be considered inadmissible under either section 212(a)(9)(B)(i)(II) or section 212(a)(9)(C)(i)(I) for any accrued unlawful presence in the United States. United States Citizenship and Immigration Services or USCIS (successor to the Immigration and Naturalization Service or the Service) has designated applicants for temporary resident status under section 245A of the Act to be in a period of authorized stay pending the final adjudication of their application. This period of authorized stay is applicable to applications for temporary resident status under section 245A of the Act that are pending appeal before the AAO. *See Memorandum, Immigration and Naturalization Service, HQADN 70/21.1.24-P, Unlawful Presence, June 12, 2002.*

As noted previously, the Immigration Judge granted the applicant voluntary departure until March 3, 1998 with an alternate order of deportation thereafter. The record contains no evidence to demonstrate that the applicant complied with the Immigration Judge's grant of voluntary departure from the United States by March 3, 1998. Further, the applicant has acknowledged that he departed this country on an unspecified date and then subsequently reentered the United States without inspection on August 8, 1998. Without evidence to the contrary, it must be concluded that the applicant departed this country under an outstanding order of removal after March 3, 1988, and that such departure constituted a self-deportation. The fact that the applicant admitted that he subsequently reentered the United States without inspection on August 8, 1998 renders him inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

On appeal, counsel contends that director erred by not issuing a notice of intent to deny as required under 8 C.F.R. § 245a.20(a)(2) prior to denying the Form I-690 waiver application. However, the regulation cited by counsel applied only to applicants for permanent residence under the provisions of the Legal Immigration Family Equity (LIFE) Act. Furthermore, this regulation was amended so that effective June 18, 2007, the issuance of a notice of intent to deny prior to the rendering of a decision is no longer required. *See 72 Fed. Reg. 19100 (April 17, 2007).*

Counsel's assertion that the applicant is not inadmissible under any of the grounds contained in either section 212(a)(9)(B)(i) or section 212(a)(9)(C)(i) of the Act is without merit for the reasons stated above.

Counsel argues that the director failed to consider either the applicant's presence in the United States for over twenty years or the severe hardship he would be forced to endure if he returned to his home country. However, the applicant's claim of continuous residence in this country since prior to January 1, 1982 must be considered questionable at best for the reasons stated in the AAO's separate dismissal of his appeal to his previously denied Form I-687 application for temporary residence and such findings need not be repeated in this decision. Further, counsel's

claim that the applicant was subjected to physical torture in India and that his return to this country would constitute severe hardship was found to be not credible when the applicant's Form I-589 asylum application was denied on July 16, 1996. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act as a result of his having departed this country under an outstanding order of removal after March 3, 1988, and his admission that he subsequently reentered the United States without inspection on August 8, 1998. Counsel and the applicant have submitted no evidence to demonstrate that such ground of inadmissibility should be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest with the Form I-690 waiver application. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing that the Form I-690 waiver application be granted by a preponderance of the evidence as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M-*, 20 I&N Dec. at 77.

Consequently, the applicant has failed to demonstrate that the applicable ground of inadmissibility should be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest pursuant to 8 C.F.R. § 245a.2(k)(2). After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.